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No. 03-1502

IN THE

Supreme Court of the United States

RANGER CELLULAR and MILLER COMMUNICATIONS, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR PARTIAL REMAND FOR CONSIDERATION OF SETTLEMENT AGREEMENT

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PARTIES AND RULE 29.6 DISCLOSURES

The parties-appellant before the United States Court of Appeals for the District of Columbia Circuit were Petitioners Ranger Cellular ("Ranger") and Miller Communications, Inc. ("Miller"). The Federal Communications Commission ("FCC") and United States of America were appellees. Intervenors on the side of the FCC were Great Western Cellular Partners, LLC, Comnet of Florida,* Endless Mountain Wireless, L.L.C.,** WWC Holding Co., Inc., and Cingular Wireless, L.L.C. (on behalf of itself and two subsidiaries CCPR Services, Inc. and Southwestern Bell Wireless, L.L.C.)

Ranger is a general partnership without any subsidiaries, parent companies or affiliates which have issued shares or debt securities. Miller is a closely held Florida corporation without any subsidiaries, parent companies or affiliates which have issued shares or debt securities.

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* This is the successor-in-interest to Monroe Telephone Services, L.L.C.

** This is the successor-in-interest to FutureWave Partners, L.L.C.

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Petitioners Ranger Cellular ("Ranger") and Miller Communications, Inc. ("Miller") hereby to remand to the Federal Communications Commission ("FCC") that aspect of the captioned case that concerns the Chambers, Texas applications of Petitioners Miller and Ranger. The relief requested is somewhat unusual because it is an administrative matter which cannot be effectuated without Court action. It does not moot or otherwise affect the substantive issues presented to the Court for review.

Briefly stated, the FCC's rules not only permit, but positively encourage, applicants to resolve the mutual exclusivity of their applications by settlement. Through an unusual confluence of events, Miller and Ranger became the only remaining applicants for one of the eight licenses in issue in this case during the course of appellate proceedings below. Miller and Ranger, who are prosecuting this appeal jointly but are otherwise unrelated entities, thereupon entered into a settlement agreement which would leave a single unopposed application pending for the vacant Chambers, Texas license. Since there would be no mutual exclusivity, there would be no need for an auction, and appellate proceedings involving those applications would be rendered moot.

At the time the settlement was reached, however, the applications (which had been dismissed solely on the ground that an auction was necessary[1]) were already at the Court of Appeals. The FCC did not act on Miller's and Ranger's request to seek the remand of the case from the Court of Appeals in order to effectuate the settlement,[2] and the Court of Appeals denied without explanation Miller's and Ranger's motion to remand that part of the case for which there was no longer a pending dispute.[3] The settlement agreement requires action by the FCC to implement, but the case can only be returned to the FCC by action of the Court with jurisdiction. Miller and Ranger therefore must ask this Court to remand the case to the FCC with directions to act on the proposed settlement in accordance with governing law.

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[1] *In the Matter of Certain Cellular Band Service Area Applications*, *Order*, rel. April 29, 1999 (DA 99-814).

[2] "Notification of Settlement" filed by Ranger Cellular and Miller Communications, Inc., on Oct. 3, 2003.

[3] *Order* in Case No. 02-1155, issued Nov. 7, 2003.

I. BACKGROUND

The captioned case concerns the FCC's unlawful dismissal of Miller's and Ranger's applications for licenses for cellular radio stations in eight different rural markets and the unlawful grant of competing applications in four of those markets. Miller and Ranger are the last two out of some five hundred applicants who filed applications for a cellular rural service area license for one of these eight markets, Chambers, Texas, in 1988. The original selectee in the lottery for this market was dismissed as defective in the early 1990's. The FCC, as required by 47 C.F.R. Section 1.823(a)(3) (1989) of its rules and by the terms of its original lottery notice, retained the group of competing applicants in pending status until a license could be finally granted. *Amendment of Commission's Rules for Rural Cellular Radio Service*, 2 F.C.C.R. 4008 (1987). ("After the construction permits are issued for each frequency block, all other applications for the RSA will be dismissed.") The FCC then held a second lottery for this market in 1992 in which a company called Alee Cellular Communications ("Alee") was chosen as the tentative selectee.

Alee, as it turned out, was a party to a secret agreement among a group of cellular applicants which was the subject of a lengthy FCC hearing in the early 1990's. The agreement was a pact among twenty-five applicants who had agreed to share their winnings with each other if any of them won cellular lotteries. Such a scheme violated the FCC's rules prohibiting partial settlement agreements, among other things. The FCC designated all of the winning applicants who had been participants in this scheme for hearing. Petitioner Miller was made a party to that litigation, and along with five other petitioners, undertook an enormous effort involving the expenditure *in toto* of more than $3,000,000 to demonstrate that the lottery had been unlawfully skewed. After three months of daily hearings and more than 13,000 pages of

transcript testimony, the Administrative Law Judge concluded that the participants had indeed violated the rules in numerous respects. *Algreg Cellular Engineering*, 7 F.C.C.R. 8686 (ALJ, 1992), aff'd, 9 F.C.C.R. 5098 (Rev. Bd. 1994), rev'd in part, 12 F.C.C.R. 8148 (1997), aff'd *sub. nom. Alee Cellular Communications v. FCC*, No. 99-1460, 2000 U.S. App. Lexis 7111, at #1 (D.C. Cir. Mar. 7, 2000), *cert. den.* 534 U.S. 950 (2001). Alee was singled out for disqualification on character grounds because it had not only participated in the scheme, but had also deliberately lied to the FCC about the disqualifying presence of an alien partner in its ownership structure. Alee appealed its disqualification all of the way to this Court without success.

While these proceedings were going on, the FCC simply held Alee's winning Chambers, Texas application in pending status, along with the applications of the competing applicants, as required by the rules. In 1997, Congress enacted the Balanced Budget Act of 1997, *Balanced Budget Act of 1997*, Pub. L. No. 105-33, §302(a), 111 Stat. 251 (1997), which repealed the FCC's authority to issue licenses by lottery. Based on that law, the FCC in 1999 dismissed all of the pending applications for Chambers (including Alee's and Miller's and Ranger's) on the sole ground that it must hold an auction and therefore could not continue to process any applications filed under the lottery regime. *In the Matter of Certain Cellular Rural Service Area Applications*, 14 F.C.C.R. 4619 (WTB, 1999). However, the FCC later decided it did not have to hold an auction after all. It therefore reinstated Alee's application[4], but, contrary to its rules, did not reinstate the competing applications at the same time. Miller, Ranger, and numerous other applicants petitioned the FCC to reconsider the dismissal of their applications. These petitions and subsequent applications for review were denied.

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[4] *In the Matter of Rural Cellular Service Applications in Markets No. 599A and 672A*, Order on Reconsideration, DA 99-1426 (1999).

Only Ranger and Miller appealed the dismissal of their applications to the Court of Appeals and then, in the present case, to this Court.

In the meantime, Alee's appeals of its disqualification were finally exhausted. At that point, the Commission designated Alee's Chambers, Texas, application for hearing before an Administrative Law Judge to determine whether it was basically qualified to hold a license. *Memorandum Opinion and Order*, FCC 02-36, rel. Feb. 22, 2002. Miller and Ranger intervened in the hearing and produced substantial evidence that Alee was not only disqualified on the basis of its original wrong-doing, but was also guilty of additional misrepresentations and rule violations which would warrant its disqualification on new and different grounds. After a week of hearings before the ALJ, Alee recognized that it was in serious danger of being disqualified on character grounds yet again, and it voluntarily dismissed its application with prejudice. That abruptly left Ranger and Miller as the only two remaining applicants for Chambers. Since the FCC's rules only permit "full market settlements"–*i.e.*, settlements among all of the pool of applicants for a particular cellular market–it had not been possible to achieve a settlement until Alee gave up the ghost. 47 C.F.R. 22.33[5] Miller and Ranger thereupon worked out a settlement agreement for Chambers which eliminated the mutual exclusivity between their applications.

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[5] Section 22.959 (2003) of the FCC's rules provides: "Pending applications for authority to operate the first cellular system in a channel block in an MSA or RSA market continue to be processed under the rules governing the processing of such applications that were in effect when the applications were filed, unless the FCC determines otherwise in a particular case." In *Western California Cellular Partners*, 11 F.C.C.R. 5705 (1996), the FCC made it clear that application of the old rule should govern settlement agreements such as the one presented here.

II. FCC POLICY STRONGLY FAVORS SETTLEMENT

Cellular applicants in 1994 were concerned that the FCC would not permit full market settlements if the FCC went to an auction format, as it then planned. The FCC expressly assured cellular applicants at that time that it would continue to permit full market settlements among groups of applicants who had filed before 1993, even if it used auctions as the licensing method. *Second Memorandum Opinion and Order*, 9 F.C.C.R. 7245 (1994). While the FCC subsequently lost its authority to use lotteries at all, the FCC's assurances that full market settlements among those applicants would be permitted remain outstanding. The general FCC policy favoring resolution of cases by settlement is codified in Section 47 C.F.R. 22.29 (1989) which expressly urges mutually exclusive applicants like Ranger and Miller to settle their disputes among themselves. ("*Policy*. Parties to contested proceedings are encouraged to settle their disputes among themselves.") This settlement between Miller and Ranger takes that injunction seriously and accomplishes precisely what the FCC encouraged. Apart from the governing regulation, it should also be stressed that Congress, when it authorized the use of auctions for competing applications, imposed on the FCC "the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. 309(j)(6)(E) (Emph. added). With this admonition in mind, the FCC has recognized the importance of permitting long-pending applicants like Ranger and Miller to settle prior to going to an auction. *In Re Implementation of Section 309(j) of the Communications Act*, 13 F.C.C.R. 15920, 15959-60 (1998).

III. NEED FOR REMAND

While no specific FCC approval of the settlement agreement is required, the FCC must still take the steps necessary to implement it. Here we have the situation of the two surviving applications having been dismissed, on grounds which were subsequently recanted by the FCC. At least one of them must be reinstated to effectuate the settlement. The FCC can and does reinstate applications for purposes of effectuating a full settlement agreement among applicants. In *Public Notice*, 5 F.C.C.R. 990 (1999), for example, the FCC adopted a settlement policy for FM applicants which had been subject to the FCC's "hard look" policy. The FCC decided that it would permit applicants who had been dismissed under the hard look policy to be reinstated in order to effectuate a settlement with other applicants who themselves had been dismissed. In other words, even when *all* of the applicants had been dismissed due to technical defects in their applications, the FCC would reinstate one of them so as to permit a settlement of the proceeding. This is consistent with the FCC's actions in *Webster-Fuller Communications Assoc.*, 66 RR2d 1093 (1989) and *Sam Widge Advertising Limited Partnership*, 6 F.C.C.R. 5290 (Rev. Bd. 1991). In the latter case, both applications had been dismissed on procedural grounds, but the FCC Review Board reinstated one of the applications so as to permit a full market settlement with the other. The fact that the dismissed applications are presently at this Court on a petition for *writ of certiorari* should be immaterial; the FCC routinely reviews and grants settlements between applicants which are reached while the case is on judicial appeal. The case must, however, be partially remanded to the FCC to allow it to reinstate and process the surviving application.

IV. EFFECT ON REMAINDER OF APPEAL

Miller and Ranger stress that remand of the two applications for Chambers, Texas will not disrupt or affect the issues presently before this Court. Those issues concern the D.C. Circuit's adoption of a new threshold for Article III standing to challenge agency decisions, and the challenge there involves four of the other markets involved in this case rather than Chambers. Indeed, review of the Chambers portion of the case was requested only to permit the Court to remand the Chambers applications, thus mooting any further litigation regarding the wrongfulness of their dismissal. Miller and Ranger therefore respectfully request that the Court of Appeals' judgment with respect to Petitioners' applications for Chambers, Texas be vacated and the applications remanded to the FCC with instructions to consider the proposed settlement under its established settlement guidelines.

Respectfully submitted,

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